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In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES P. MITCHELL, SECRETARY OF LABOR,
PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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INDEX

	Page
QUESTIONS PRESENTED	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. "First Processing" Includes All Operations From Receipt of Corn and Carrots to Final Packaging In Retail Packages	5
II. The Section 7 (c) Exemption Applies To Mixing of Vegetables As It Is A Continuation of The Packaging Which is First Processing. The Addition of Other Vegetables Is Not A New or Different Process But Only A Means of Packing The Corn and Peas	10
III. Section 7 (b) (3) Is An "Industry" Exemption And Not An "Operation" Exemption. Respondents Are Engaged In A Branch of An Industry Found By The Administrator	11
CONCLUSION	17

CITATIONS

Cases:	
Domenico v. *Mitchell*, 232 F. 2d 112	12, 14
Hendricks v. *DeGeorgio Fruit Corp.*, 49 F. Supp. 573	11, 12, 15
McComb v. *Hunt Foods*, 167 F. 2d 905	11
Mitchell v. *Oregon Frozen Foods*, 145 F. Supp. 157; 254 F. (2) 116; 264 F. (2) 599	16
Wyatt v. *Holtville Alfalfa Mills, Inc.*, 106 F. Supp. 624, 631	12
STATUTES AND REGULATIONS:	
Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*	
Sec. 7 (b) (3)	12, 13, 14
Sec 7 (c)	2, 6
29 C. F. R. (1958 Supp.) 526.3	13

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QUESTIONS PRESENTED

Respondents are satisfied with appellants statement of the second and third "Questions Presented" but differ with the language in the first question, particularly: "stores them until after the season has ended and thereafter packages them." Actually part of the bulk stored vegetables are "repackaged" during the harvest season (R 154) and as such is first processing.

We would like that thought expressed in the question and suggest the following:

Whether a continuation of repackaging, after harvest season, of previously frozen and bulk packaged

vegetables continues to be a part of "first processing of * * * fresh fruit and vegetables" under Section 7 (c) of the Fair Labor Standards Act so as to exempt the processor from the overtime requirement of the Act.

Or as otherwise, but less succinctly stated:

Whether a frozen food processor who freezes vegetables and packs part of them in consumer-packages and the balance in bulk containers a portion of which is repacked in consumer's packages during harvest season, as time permits, and the balance following the harvest season, whether the latter continues to be "first processing of * * * fresh fruits and vegetables" so as to be exempt under Section 7 (c) of the Fair Labor Standards Act from the overtime requirements of the Act.

SUMMARY OF ARGUMENT

It is respondents' position that all steps required from the receipt of the vegetables to finally packing in retail packages constitutes one single and indivisible process. That the temporary storing of frozen vegetables in bulk is only one step in this process and all of the operations constitute "First Processing" under Sec. 7 (c) of the Act.

That the vegetables are perishable even though frozen and that there exists definite pressure to package the vegetables in retail packs as early as possible.

That the storage is not an end to the process but only part of the "first processing."

That respondents are entitled to the exemptions under Sec. 7 (c) of the Act in mixing vegetables. The

addition of beans and peas to corn and carrots does not change the essential characteristic of the process. The operation is still a processing of corn and carrots.

Respondents are entitled to the exemption under Sec. 7 (b) (3) in mixing vegetables for the reason that the exemption is broader than Sec. 7 (c) and embraces all processing and is not limited to first processing. Sec. 7. (b) (3) is an exemption to the branch of the industry which has been found by the Administrator to be of a seasonal nature and is applicable to that branch of the industry and not to a portion of its activities.

Even if Oregon were not entitled to the exemption under 7 (c) in the mixing of corn and carrots with beans and peas, which we feel it clearly is, it would still be entitled to the exemptions under Sec. 7 (b) (3) as being part of a branch of an industry found by the Administrator to be of a seasonal nature.

OREGON RELIES UPON THE FOLLOWING PROPOSITIONS IN SUPPORT OF ITS CLAIM TO THE EXEMPTIONS UNDER SECTIONS 7 (c) AND 7 (b) (3) OF THE ACT:

(1) The purpose of the exemptions under 7 (c) and 7 (b) (3) of the Act is to afford relief to farmers in marketing their products.

(2) Appellant concedes that all steps from the receipt of the vegetables to putting it into the retail package constitutes "First Processing" if done in a continuous, uninterrupted flow.

(3) All activity is one continuous process and the storage in bulk containers is only one, but a necessary, step in the continuous processes.

(4) The facts found by the trial court are entitled to great weight and should not be overturned in the absence of a finding that they are clearly erroneous.

(5) Section 7 (b) (3) of the Act applies to all operations of a branch of an industry found to be seasonal by the Administrator and is available during every part of the year.

(6) The result of appellants position would be to deny respondents the full number of weeks which the Act grants, cutting them from 28 weeks to nine or ten weeks. The cost of production is reflected in the price paid to farmers.

(7) The main purpose of the processing is to "get it into the retail package as quickly as possible" (R 91-2); also during peak season (R 100); a first processing ends only when the product is finally placed in retail packages.

(8) Putting the corn and carrots in 64 cu. ft. bins is not "packaging" and thus packaging from bin to retail packages is in fact the first "packaging" and not a "repackaging", although it is spoken of in those terms in the record by all parties.

(9) All steps in Ore-Ida are considered to be first processing. Actually there is more "processing" in french fried potatoes than in frozen corn on the cob or mixed vegetables.

(10) The exemption should not be whittled away by fine distinctions, the full purpose of the Act should be preserved for the benefit of the farmers.

(11) Grading and inspecting of product is conceded to be part of first processing (Ap. B. 4-5, C.C.).

(12) Placing corn in 64 cu. ft. bins after freezing

is not an interruption in the process but is rather a necessary step in preserving the corn until the packaging crew can pack it in consumer size packages, at which point the corn and carrots are then, but only then, "processed."

(13) When the lower court stated that the corn and carrots were not "processed" it was simply distinguishing the operation from one of "manufacturing."

(14) The pressure to get corn and carrots into consumer size packages continues throughout the operation.

(15) Mixing peas, string beans, and lima beans with corn and carrots does not change the essential characteristic of the operation. It is merely a method of packaging.

(16) Findings of the Administrator of the Act defining first processing was based on:

Plants which receive for packing 30 per cent or more of the total annual volume of fresh fruit or vegetables in a period or periods aggregating not more than 14 work weeks (R 45). The corn is received from August 1 to October 10 or ten weeks (R 16) and the carrots are received from October 15 to December 1, or six weeks (R 18).

ARGUMENT

I

"FIRST PROCESSING" INCLUDES ALL OPERATIONS FROM RECEIPT OF CORN AND CARROTS TO FINAL PACKAGING IN RETAIL PACKAGES.

The exemption under Section 7 (c) applies to

"First Processing of, or in canning or packing perishable or seasonal fresh fruit or vegetables." There can be no doubt that we are dealing with fresh vegetables. The only question is "What is First Processing?"

The government concedes that all the steps of the operation from receiving to packaging in retail packages constitute "First Processing" (R 67) Br. 8, if done in a continuous process, but they claim the storing in bulk breaks the continuous process and that all activities thereafter are something other than "First Process."

The purpose and manner of temporarily storing in bulk is important.

It is impossible to package into retail packs 5,450,000 pounds of corn (R 24) from August 1st to October 10th (R 19). 1,513,877 pounds were so packed (R 24). The balance was placed in either 64 cubic feet neophene lined pallets or 50 pound cardboard containers and put in cold storage (R 25). When the packaging facilities are sufficient to handle more than the daily run during harvest season, the corn is brought out of cold storage and packed in consumer size packages (R 154). This process is continued after the fresh corn run is over and until all of it is packaged (R 24 and 66). It is the very nature of the corn and carrots that makes this an economic necessity. Time and speed continue to be essential as Mr. Grigg testified.[1]

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[1] "That's the theory, get it into the package as fast as you can" (R. 82) and "Well, our attempt is to get them into this retail form as fast as we can regardless of whether we have an order or not" (R 83) and "* * * so you bring in a large

It would be ideal if respondent could pack all the corn in retail packages as it is frozen (R 104). But it would be impractical to have enough packaging machines to do this, if it were possible (R 105).

The term "repackaging" has been used throughout this case but it is important to visualize the exact procedure. Accurately speaking the corn and carrots are not "packaged" when they are placed in the 64 cubic feet bulk bins or carrots in 50 pound bulk cartons. Therefore, when the vegetables are taken out and put in retail packages, that is actually the first "packaging" of the corn and carrots. The term "repackaging" simply distinguishes it from the operation of packaging directly off the freeze line or tunnel. The steps for corn are best described in the pre-trial order (R 16 and 17) and the same is true of carrots (R 18).

It is interesting to note that the government concedes that the operations of Ore-Ida Potato Products Inc. are entitled to both exemptions, Section 7 (c) and 7 (b) (3).[2] Ore-Ida is an affiliated corporation of Ore-

influx of product and during the harvest season, and then you work it through as fast as you can." (R. 104) "Q. Now, during the active corn season is any of this corn taken off the lines and put into cold storage particularly during the day shift and if there is a slack period during the night shift, is that brought back out? A. Yeah. We fill up every minute's time we can. Say, if something happened in the field so the corn wasn't flowing in at night for processing if there is any spare time at all, why, we bring it back out and we pack it then."

[2] "Ore-Ida does not bulk freeze and store its potato products for subsequent repacking or mixing, but immediately packages them into consumer-size cartons as a part of the initial freezing operation during the active processing season. Therefore, no question is raised on this appeal as to the appli-

gon, leasing one-half of the same plant, using two of the four freeze tunnels while Oregon uses the other two (R 15). Ore-Ida produces french fried potatoes, hash brown potatoes and french cut potatoes and shredded potato patties (R 14). The basic operations are similar if not identical with those of Oregon. The vegetables are received, washed, peeled, cut, blanched, diced or shredded, and then frozen. The only distinction that can be made lies in the fact that all the potato products are packed in consumer size packages at the end of the freezing tunnels while about two-thirds of the corn and part of the carrots are first placed in bulk containers and then packaged from the bulk containers during and following the harvest season rather than directly from the freezing tunnels.

It is also clear that grading and inspecting the corn and carrots constitute necessary steps and are clearly part of "First Processing." The appellant so advised the Court of Appeals.[3]

A basic question or pivotal factor in determining whether First Process includes all steps from receipt of corn and carrots to packaging them in retail pack-

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cability of the Section 7 (b) (3) and Section 7 (c) exemptions to Ore-Ida's potato operations." (App. Br. Court of Appeals, Page 5)

[3] "Concededly, all the operations involved in converting these fresh vegetables (corn, carrots and potatoes) into frozen food products are exempt. They include inspecting, weighing, sorting, washing, trimming or cutting, blanching, cooling, quick-freezing, packing in bulk or packing into retail or consumer-size packages, when such retail packaging is performed immediately following and as a part of the freezing process." (App. Br. Court of Appeals, Pages 4 and 5).

ages is simply this: "Is the placing of frozen corn and carrots in bulk containers an end result in itself or an end of a process or operation and therefore the end of 'First Processing'?" Or "Is it an integral part of a series of operations terminating with a frozen food in consumer-size package?" If the former, then First Process could conceivably end there, but if the latter, First Process continues until the corn or carrots are finally placed in such consumer size packages.

The only reason or excuse for respondents' operation is to freeze vegetables and prepare them for market. This purpose cannot be accomplished until the product is put into consumer packages. There would be no economic justification to freeze corn and carrots and put them in bulk storage.

But here, the entire effort and purpose is to get these products into consumer packages and sold. When they are processed to that point they are processed but they do not reach that point until placed in consumer packages.

That is the end result and all steps preceding it are necessary. If it is necessary to bulk store the corn and carrots it is only a delay in the final finished product.

Those pallets which are pulled out of zero storage during the corn run (R 81) must of necessity be classed as First Process as it is done during and as part of the corn freezing operation.

Appellants concede that packaging from bulk storage during harvest season is First Process. "It was conceded at the trial that Oregon was entitled to the exemptions during those weeks," (harvest season). (App. Br. 8).

If repackaging from bulk containers during harvest season is First Processing why is the same operation immediately following the harvest season not First Processing?

A part of each days run is packaged directly from the freeze tunnel; the balance is stored in bulk containers (R 25). As time permits during the harvest season. the bulk containers are brought out and the product packaged in consumer size packages (R 25). It is this repackaging that was conceded to be First Processing at the trial.

If repackaging during the active corn harvest season is First Processing a continuation of this same repackaging must likewise be First Processing. There is no difference in the operations, but simply a continuation of it, until the entire crop is packaged.

ARGUMENT

II

The Section 7 (c) Exemption Applies to Mixing of Vegetables As It Is A Continuation of The Packaging Which is First Processing. The Addition of Other Vegetables Is Not A New Or Different Process But Only A Means of Packing The Corn and Peas.

Obviously, if the packaging of corn and carrots from the bulk bins is a continuation of first processing during the harvest season it continues to be first processing following the harvest season. If Oregon is entitled to the exemptions under Sec. 7 (c) for packaging after the harvest season, the addition of other vegetables does not make it a different process. If the corn and carrots were packed as succotash it would

add nothing new and would be simply another method of packing. Does the addition of frozen peas and beans make this another process? We do not feel it does. It is similar to the addition of brandy for fortifying wine. "It was clearly an operation incidental and necessary to defendants' exempt operation and thus fell within the exemption."[4]

Sixty per cent of the mixed vegetables are corn and carrots and forty per cent are peas and beans. Seventy-seven per cent of the carrots processed goes into the vegetable mix (R 24).

All the reasons why Sec. 7 (c) apply to the repacking of corn and carrots following the harvest season apply also to the mixing of vegetables during the same time.

The fact that first processing is started in one plant and finished in another, even separately owned, or dividing the operations between two processors seems to be irrelevant.[5]

ARGUMENT

III

Section 7 (b) (3) Is An "Industry" Exemption And Not An "Operation" Exemption. Respondents Are Engaged In A Branch of an Industry Found By The Administrator

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[4] *Hendricks* v. *De Georgio Fruit Corporation* 49 F. Supp. 573-576.

[5] Whether dehydrating one part of the apple and making of juice and pomace from other parts of the same apple is accomplished on a continuous production line under one roof, or is accomplished by dividing the practically simultaneous operations between two adjacent producers, would seem to be irrelevant." *McComb* v. *Hunt Foods*, 167 F. (2) 905.

To Be Seasonal In Nature, And Are Entitled To This Exemption Independent of Section 7 (c) of The Act.

The First and Second argument of appellant deals with Sec. 7 (c) but the third (Ap. Br. 26) deals with Sec. 7 (b) (3) claiming that Section is not applicable to "repackaging" nor to "mixing." We assume that they mean those operations that are performed after the active corn or carrot freezing season — corn from August 1 to October 10 and carrots October 15 to December 1. We make that assumption for the reason that it has been conceded that all operations performed during the active freezing period is exempt. "It was conceded at the trial that Oregon was entitled to the exemptions during those weeks."

The Administrator has found that this is a branch of an industry which is seasonal in nature. There is no requirement in Section 7 (b) (3) of the Act that the particular activity must be "first processing."[*]

The exemption under 7 (b) (3) is in no way dependent upon Sec. 7 (c) and have different requirements. The latter is "First Processing" and the former is "Seasonality" and is "broader in scope than Section 7 (c). It is not restricted to first processing of such fruits or vegetables." *Domenico* v. *Mitchell*, 232 F. 2d 112.

Furthermore the definition of seasonality fits

[*] "The Test under this particular subsection is not the operation of the individual employer, but that of the industry as a whole. If the industry is seasonal in nature, the benefit of such finding extends to every employer * * *" *Wyatt* v. *Holtville Alfalfa Mills, Inc.* 106 F. Supp. 624, 634. See also *Domenico* v. *Mitchell* 232 F (2) 112 and *Hendricks* v. *Di Georgio Fruit Corp.* 40 F. Supp. 573.

respondents' operation completely. Corn is received from August 1 to October 10, a period of nine to ten weeks — carrots from October 15 to December 1, a period of six weeks.[7]

The fact that the government agrees that Sec. 7 (b) (3) is applicable to respondents' operation during the harvest season can be based only upon a finding that the operation is a branch of an industry found by the Administrator to be seasonal in nature. If the nature of the business is seasonal, the exemption is available. The exemption may be claimed during any part of the year and is not dependent upon "First Processing."

To reason otherwise is to obliterate the distinction between the two exemptions and in effect deny one. In this case, the government seeks to deny both exemptions to the "repackaging" and "mixing" after the freezing operation has terminated. If it is held that these operations do not constitute "first processing" the respondents are still entitled to the 7 (b) (3) exemption. We again point out that all operations of Ore-Ida are conceded to be entitled to each exemption, *i. e.* Sec. 7 (c) and 7 (b) (3) and such exemptions are not interdependent or mutually exclusive. While the Court denied the exemption of Sec. 7 (c) of the Act to "mountain grown" vegetables, they did grant

[7] Regulation promulgated by Administrator being Part 526, Industries of a Seasonal Nature, June 1953, Section 526.3 "The exemption for an industry of a seasonal nature is applicable to * * * an industry which * * * receives * * * fifty per cent or more of the annual volume in a period or periods amounting in the aggregate to not more than 14 work weeks."

exemption under Sec. 7 (b) (3) to them in *Domenico* v. *Mitchell (Supra)*.*

Even if Oregon were not entitled to the exemptions under Sec. 7 (c), it is clear that they are entitled to those under 7 (b) (3) as to mixing operation. The Administrator has found that the packing, handling, and preparing in their raw or natural state of perishables or seasonal fresh fruit and vegetables *is a branch of an industry and of a seasonal nature* within the meaning of Sec. 7 (b) (3) of the Act.

We are dealing with a branch of an industry and must look at the total branch to determine whether the exemption applies. There is no doubt that Oregon deals with perishable and seasonal vegetables, to-wit: corn and carrots. Also that they are "received for packing 50 per cent or more * * * in a period of * * * not more than 14 work weeks."

Further that the operation is "* * * during an annually recurring season or seasons of six weeks to six months and cease first processing * * * operations during the remainder of the year * * *" (R 45 and 46).

It is the total operation of this branch of the industry that determines whether Sec. 7 (b) (3) applies, not a branch of the branch. The Administrator did not and could not examine a small portion of the operation to determine whether the exemption applied or

* "Indeed, if it limited the definition of a seasonable industry with respect to fresh vegetables to first processing it would be in direct contravention to the mandate of Section 7 (b) (3) making it the duty of the Administrator to define a seasonable industry."

not. It is an industry exemption or at least a "branch of an industry" exemption. If the exemption applies to the industry, or a branch thereof, it is available to that industry or branch thereof. It is an "industry" exemption as opposed to an "operation" exemption such as we find in Sec. 7 (c). If the distinction is not followed, it would effectively do away with Sec. 7 (b) (3), unless the particular operation also qualified under Sec. 7 (c).

The Administrator was told by Congress to determine what industry or branch of industry was seasonal and to accord to such industry the partial exemption of 14 weeks, up to 12 hours a day and 56 hours per week.

The industry we are concerned with is the frozen food industry. The branch is the "packing, handling and preparing in their raw or natural state of seasonal fresh fruits and vegetables" (R 45).

If Oregon is engaged in such a branch of industry it is entitled to the exemption under 7 (b) (3) of the Act. Since the Administrator has so found and since the government concedes that Oregon is entitled to this exemption generally, it clearly establishes it to be a branch of an industry of a seasonal nature.

Respondent feels that this mixing is first processing or "an operation incidental and necessary to (Oregon's) exempt operations and thus fell within the exemption."[9] or failing that, that the "mixing" operation is part of a "branch of an industry found by the

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[9] *Hendricks* v. *De Georgio Fruit Corporation* 49 F. Supp. 573.

Administrator to be of a seasonal nature" and therefore entitled to the exemption by Sec. 7 (b) (3) as an "industry" exemption rather than an "operation" exemption.

Certainly the mixing of corn and carrots with beans and peas cannot be classified as a "branch of an industry" and thus be segregated for this purpose of determining the exemption under Sec. 7 (b) (3) of the Act. It is an integral part of an operation; the sum total of all operations constitute the "branch of an industry."

We apologize to the Court for discussing so many of the facts but our only reason for doing so is our conviction that the application of Sec. 7 (c) and 7 (b) (3) are factual matters. The able trial court heard the facts and made his findings on the facts so found. It is impossible to determine whether the exemptions are available without an application of the Act to the facts.[10]

[10] *Mitchell v. Oregon Frozen Foods Company* 145 F. Supp. 157, 162-163 and 254 F. (2) 116 and 264 F. (2) 599. That is why the Court of Appeals says "We take our stand firmly upon the findings of fact and the able opinion of the District Judge which clearly interprets the statute in the light of the facts so found * * * However, an interpretation cannot be made without facts. The interpretation placed upon the facts relating to the fruit and vegetable industry by a Judge fully cognizant of the problems of farmers and orchardists in an agricultural area are entitled to high respect."

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 1959.